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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 192

CALVIN CLARK,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No. .....

CALVIN CLARK,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CALVIN CLARK, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 30, 1970.

Citations to Opinion Below

The Opinion of the United States Court of Appeals for the Third Circuit is reproduced in Appendix B hereto, *infra*, pp. 8-19.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 30, 1970, and is re-

produced in Appendix C hereto, *infra*, p. 20. The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254.

Questions Presented

Whether the conviction of the petitioner based solely upon evidence improperly admitted is in violation of petitioner's right to a fair trial under due process of law.

Statutory Provisions Involved

The constitutional provisions involved are found in the Fifth Amendment of the Constitution of the United States, which is printed in Appendix A, *infra*, p. 7.

Statement

On April 19, 1967 a true bill was returned charging the petitioner in two counts. First, with knowingly having in his possession 23.8 grams of heroin which had been unlawfully imported contrary to law and in violation of Section 174 of Title 21 U. S. Code; and second, with having unlawfully and knowingly distributed and purchased the same narcotic drug, other than in or from the original stamped package, in violation of Section 4704(a) of Title 26 U. S. Code and contrary to Section 7237 of Title 26 U. S. Code.

Trial by jury commenced on May 21, 1968 and concluded on May 27, 1968, with a verdict of petitioner's guilt as to both counts.

Following disposition of motions in arrest of judgment and/or for a new trial, the petitioner was sentenced on January 17, 1969, on Count One, to imprisonment for a term of 10 years and fined the sum of $2500.00, and on Count Two, was sentenced to imprisonment for a term of

10 years and fined the sum of $2500.00, the sentence of imprisonment on Count Two to run concurrently with the sentence imposed on Count One. A timely appeal was taken to the United States Court of Appeals for the Third Circuit and in an Opinion of that Court filed April 30, 1970, and reproduced in Appendix B hereto, the judgment of the United States District Court was affirmed.

Reasons for Granting Writ

The evidence necessary to sustain the conviction of the petitioner was improperly admitted over timely objection, resulting in petitioner's failure to secure a fair trial, violative of his Fifth Amendment right to not be deprived of his life, liberty or property without due process of law.

The Government's case was predicated entirely on the admissibility of a package retrieved by two police officers on March 15, 1967, alleged to have been in possession of the petitioner shortly before its discovery, and alleged to have contained heroin. The Government offered into evidence at the time of trial certain glassine envelopes and other packaging materials which it contends were contained in the bag retrieved by the police officers on the night in question. After receiving this evidence, the Court admitted testimony concerning chemical analysis of the contents of the envelopes, as well as testimony concerning fingerprint comparisons made with latent fingerprints taken from several of the envelopes.

It was admitted throughout the course of the trial and on appeal by counsel for the Government that the custody and care of the physical evidence was such that a positive identification of the materials offered at trial being the same as those retrieved on March 15, 1967 as charged could not be made. In order to support the admissibility of this

testimony, the Government relied upon the coincidence that the same number of glassine envelopes retrieved by the police officers on March 15, 1967 corresponded with the number of glassine envelopes accounted for at the time of trial. The testimony, however, proved to be inconsistent with this theory, since the envelopes accounted for at trial fell short of the 347 envelopes retrieved by the police officers, and the Government was never able to satisfactorily explain the discrepancy.

In order to further bolster the charge of possession, the Government offered into evidence an admission of the petitioner that he had, shortly before being accosted by the police officers, discarded a brown paper bag. At the time he admitted possession of a bag, petitioner had been accosted by the police officers and was being questioned without having first been advised of his rights to counsel and to remain silent.

Timely objections were made to the admissibility of any admissions of the petitioner as being violative of the standards enunciated in *Miranda v. Arizona*, 384 U. S. 436 (1966). The United States Court of Appeals found that the preservation of the traditional police role in conducting on-the-street inquiries removed the interrogation of the petitioner from the warning prescribed under *Miranda*. The Court, however, failed to recognize that securing admissions by improper interrogation, while perhaps a justifiable course of conduct in conducting on-the-street inquiries and, therefore, not *per se* a violation of one's Constitutional Rights, becomes error when these self-incriminations are thereafter admitted into evidence at trial.

The Court of Appeals ruled that the failure to properly identify the exhibits offered at trial, and the subsequent testimony concerning scientific tests relating thereto, was

cured by a charge to the jury that they must find the evidence offered to be the same as that retrieved at the scene where the offense charged allegedly occurred.

This Court has recognized that instructions to the jury do not act as a cure-all in relieving the trial court of making necessary determinations as to admissibility of evidence as a matter of law. In *Jackson v. Denno*, 378 U. S. 368 (1964), it was held that the defendant is constitutionally entitled to at least have the trial judge first determine whether a confession has been voluntarily made before the confession is submitted to the jury on the issue of its credibility. This Court further reaffirmed this position in *Bruton v. United States*, 391 U. S. 123 (1968), when it held that consideration of a confession by an accomplice cannot be considered by the jury in assessing the guilt of the accomplice and then completely ignore the confession's incriminating statements as to a co-defendant when assessing the guilt or innocence of the co-defendant. The Court recognized that the "practical and human limitations of the jury system cannot be ignored." A jury cannot conveniently disregard certain facets of testimony while it makes preliminary determinations as to others. So, in the instant case, should it be recognized that the jury, as a practical matter, could not, with knowledge that petitioner's fingerprints had been found on glassine envelopes containing heroin, ignore these facts while determining first beyond a reasonable doubt that the envelopes were in fact those retrieved by the police officers on March 15, 1967, as charged in the true bill of indictment.

The failure by the trial court to require the Government to establish as a matter of law the identity of the evidence offered at trial, and instead submitting in effect this legal-

determination, denied to the petitioner his right to a fair trial and resulted in his deprivation of life, liberty, and property without due process of law.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES P. McKENNA, JR.,
Counsel for Petitioner.

Date

JAMES P. McKENNA, JR.,
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820 Grant Building,
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Appendix A

Fifth Amendment of the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17841

UNITED STATES OF AMERICA

v.

CALVIN CLARK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued November 20, 1969.

Before Hastie, Chief Judge, and Van Dusen and Adams, Circuit Judges.

OPINION OF THE COURT

(Filed April 30, 1970.)

By VAN DUSEN, Circuit Judge.

Defendant was indicted, tried, and convicted by a jury on both counts of a two-count indictment which charged that he (1) unlawfully, wilfully, and knowingly did receive, conceal, and facilitate the transportation and concealment of narcotic drugs after those drugs had been illegally im-

ported into the United States, knowing that the drugs had been illegally imported, in violation of 21 U. S. C. § 174; and (2) unlawfully, wilfully, and knowingly did purchase narcotic drugs other than in or from the original stamped package containing those drugs in violation of 26 U. S. C. § 4704(a). At trial, the Government introduced evidence to show that the narcotic drug involved was heroin and the jury returned a verdict of guilty on both counts. This appeal, from an order of judgment and commitment entered on January 16, 1969, which assessed separate fines totaling $5,000. and concurrent prison sentences of ten years, asserts constitutional infirmities in both of the statutes involved, as well as certain procedural errors at the trial.

First Count (21 U. S. C. § 174[1])

The defendant first contends that he was denied due process of law by the application to him of the presumption contained in the second paragraph of this statute, providing that inferences of both illegal importation and the possessor's knowledge of same could be drawn from mere possession. He relies on that portion of the Supreme Court's opinion in *Leary v. United States*, 395 U. S. 6, 29 (1969), which invalidated a companion provision (21 U. S. C. § 176(a)) allowing a similar inference as to marijuana. The answer to this claim is that the Supreme Court has

[1] 21 U. S. C. § 174 provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. . . ."

recently considered and rejected it in *Turner v. United States*, 396 U. S. 398 (1970). There the Court ruled that, with respect to heroin, the presumption of illegal importation, "[w]hether judged by the more-likely-than-not standard applied in *Leary v. United States, supra*, or by the more exacting reasonable-doubt standard normally applicable in criminal cases," *Id.* at 416, was valid since the facts available indicated that all heroin in this country has been illegally imported. With regard to the presumption of knowledge, the Court stated that "'Common sense,' *Leary v. United States, supra*, at 46, tells us that those who traffic in heroin will inevitably become aware that the produce they deal in is smuggled". (396 U. S. at 417) and ruled that this aspect of the statute was also not proscribed by due process requirements. Defendant's contention must, therefore, be rejected.

Second Count (26 U. S. C. § 4704(a)[2])

Clark argues that, having asserted his Fifth Amendment privilege against self-incrimination, he could not be punished for acquiring narcotic drugs without having paid the 1¢ per ounce regulatory excise tax under the rulings of the Supreme Court in *Marchetti v. United States*, 390 U. S. 39 (1968); *Grosso v. United States*, 390 U. S. 621 (1968); *Haynes v. United States*, 390 U. S. 85 (1968); and *Leary, supra*. This follows, he claims, since payment of the tax pursuant to the Harrison Narcotics Act[3] would have posed a threat of prosecution under various Federal and State laws. He therefore contends that his prosecution for purchasing unstamped narcotics cannot stand.

---

[2] 26 U. S. C. § 4704(a) provides:

"(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession the same may be found."

[3] 26 U. S. C. § 4701 *et seq.*

In evaluating this assertion, it is noted that, while the Court in the above-mentioned *Turner* case also considered and affirmed the constitutionality of this section, it did so with regard to that provision of § 4704(a) which provides that proof of possession shall be *prima facie* evidence of a violation, and it did not discuss any self-incrimination problem the section might pose.[4] The scheme of the Harrison Narcotics Act was succinctly described in another recent Supreme Court narcotics decision, *Minor v. United States*, 396 U. S. 87 (1969). There the Court said:

> "The Harrison Narcotics Act, 26 U. S. C. § 4701, *et seq.*, applies to various drugs, including heroin. Dealers must register and pay an occupational tax, 26 U. S. C. §§ 4721-4722; producers or importers who sell must purchase stamps and affix them to the package, 26 U. S. C. §§ 4701, 4703, 4771(a)(1); and it is illegal to purchase or sell except from the original stamped package, 26 U. S. C. § 4704(a). As in the case of the Marihuana Tax Act, all transfers, with exceptions not relevant here, must be made pursuant to a written order form issued by the Government. 26 U. S. C. § 4705(a). Only dealers who are in compliance with state law may register, and only registered dealers may secure order forms. 26 U. S. C. §§ 4705(f), (g); see 26 U. S. C. § 4721; 26 CFR § 151.24. Order forms are issued in triplicate to proper applicants and are stamped only with the name of the prospective purchaser. 26 U. S. C. § 4705(f); 26 CFR § 151.161. When a purchaser decides to execute a form, he fills in the exact date of the order and the number and type of drugs requested and signs his name to the form. 26 CFR §§ 151.163-151.165; 151.167. The purchaser retains the duplicate and delivers the original and the triplicate thus executed to the seller, who enters the number and size of the stamped packages furnished and the date when each item is filled. 26 CFR §§ 151.161(a); 151.185. A regulation, 26 CFR § 151.201, requires the seller to forward the triplicate to the Internal Revenue Service at

[4] This claim was raised in an *amicus* brief but not passed on by the Court. See brief for *amicus curiae* Cleveland Burgess at 17-20.

> the end of the month. Section 4705(d) of the Act requires both seller and buyer to keep their respective copies for a period of two years and to make them accessible to inspection by law enforcement officers." *Id.* at 94-95.

Minor's indictment and conviction for selling narcotic drugs to persons who failed to present a properly executed order form in violation of § 4705(a) was affirmed by the Court. Reading the section to proscribe sale to those who have either failed to register or who could not register because their dealings were illicit, the Court concluded:

> "Confronted with would-be buyers in this class, 'full and literal compliance' with § 4705(a) leaves the seller only one alternative: not to sell. Since from this record it is clear that Minor's customer was not a registered buyer, the alleged possibility of incrimination is purely hypothetical." *Id.* at 97.

In the instant case, Clark was charged with having purchased heroin other than in or from the original stamped package in violation of § 4704(a). As the quoted excerpt describing the scheme of the Act indicates, these stamps are to be affixed by either the producer or the importer after he has paid the tax. None of these tasks is the responsibility of the purchaser, who has only one duty under this section—to avoid purchase of unstamped narcotics. Viewed in this light, it is clear that for Clark, "full and literal compliance" left him with the same alternative which the Court found unobjectionable in *Minor*—not to participate in the transaction.

Our view that the stamp provisions of the Act are constitutional as applied to the purchaser of heroin is strengthened by the realization that a prospective purchaser who has fully complied with the order form provisions (26 U. S. C. § 4705(a)) of the Act and thus is legally entitled to buy narcotics, is still under a duty not to purchase un-

stamped narcotics and may, under a literal reading of the section involved here, be convicted for violating § 4704(a). Thus Clark's contention that the conviction under Count 2 is a violation of the privilege against self-incrimination is rejected.[5]

Alleged Violation of Miranda v. Arizona

The defendant's next argument centers on the admission into evidence of remarks he made when stopped by the police on a public street in Pittsburgh. He also objects to the admission into evidence of the narcotics described in the indictment.

The evidence at trial establishes that two Pittsburgh police officers, cruising in a patrol car, first observed a man they identified as the defendant[6] at approximately 9 P. M. on March 15, 1967, walking in a deserted area of the city frequented by litterers. When first observed, the defendant was carrying a brown paper bag. Deciding to "check him out," the officers turned their car and arrived back at the spot from which the first observation had been made in about 35 seconds. They then saw the defendant running toward them without the bag and as the car approached he gestured for the officers to stop. Officer Williams' testimony described the ensuing questioning:

> "Q. Continue, Officer. After the car stopped and you got out, what happened?
>
> "A. Well, upon questioning him as to what he did with the bag he was carrying, he had first stated that

[5] As a practical matter, there are policy advantages in finding 26 U. S. C. § 4704(a) constitutional now that 26 U. S. C. § 4705(a) has been upheld in *Minor v. United States*. The penalty for violation of the former section gives the trial judge discretion to place a first offender-defendant on probation (26 U. S. C. § 7237(a) and (d)(2)), whereas the penalty for violation of § 4705(a) carries a mandatory minimum sentence of five years and a prohibition on inclusion in the sentence of any provision for probation even for first offenders. See 26 U. S. C. § 7237(b) and (d)(1).

[6] Clark claimed at trial that the officer's identification was actually an identification of his twin brother.

he had thrown it in this section here. There was an old sofa there covered with snow and stuff, and I immediately told him, I said, 'You wasn't over in this section because your footprints are not in the snow here.' So, he says, 'Well, maybe I threw it over here.' So, he walks over here, indicating that he threw it over in this section here. Again I told him, 'Well, how could you have thrown it over here? This is the first track that you are making here in the snow.' So, I asked him if he had any identification on him. He said he didn't have any identification, that he had been up there at the Eat and Park to get some sandwiches for his wife, but he had changed his mind. So, I asked him to take the stuff out of his pockets and lay it on the radio car, and he took out of his rear pocket a set of keys. I then patted him and I found nothing else on him. At that time, believing that he was probably trying to evade the littering law, I felt that it was all right since there was nothing but a paper bag anyway, so I told him, 'Okay, beat it out of here.' I then got back in the radio car and he came back up to the radio car and was asking me, 'Well, why did you stop me in the first place?' I said, 'Well, you're lucky to be getting away with questioning. Look at this whole area here. It has been littered with litter and stuff.' I said, 'That is why we are checking this area, to try to stop some of this.' Then he left the radio car and proceeded in this direction."

The narrative is continued by the other policeman, Seifer:

"Q. After Mr. Clark left the cruiser, what did you and your partner do, if anything?

"A. When he left the cruiser, I turned around, went up Dahlem Street, checked the illegally parked car which was not there at that particular address. I said to my partner, 'John, I think we should go back. There is a half inch of snow on the ground and it is unreasonable that we can not find a brown paper bag on a completely white surface.' At which time I made a right, came in Penn Avenue and made another right, and came back.

"Q. Now, from the time Mr. Clark left the police cruiser until the time you returned to the area where you had questioned him, how much time elapsed?

"A. Oh, I would say approximately ten minutes.
"Q. When you got back to the area where you had first stopped and questioned Mr. Clark, was he there?
"A. On my return?
"Q. Yes, sir, on your return to Railroad Street.
"A. No, he was not.
"Q. Was any one there?
"A. No."

Officer Seifer followed a set of footprints leading up a path and about five feet from the path he found a brown paper bag lying inside a rubber tire. The bag contained two plastic juice cartons and inside each carton were numerous small glassine bags, which subsequent analysis revealed to bear defendant's fingerprints and to contain heroin.[7]

Clark maintains that having confessed to a littering offense, he was entitled to be given the requisite warnings, required under *Miranda v. Arizona*, 384 U. S. 438 (1966), where "custodial interrogation" is present, so that all he said after admitting having thrown away the bag should have been excluded, as should the bag itself as a "fruit" of an unlawful interrogation. We need not pass on this contention, since the alleged statements of the defendant were not important evidence needed for the proof of any of the elements of the crimes for which he was charged since the police officers testified that they observed him first with, and then without, the bag. These alleged statements were pertinent in evaluating the credibility of the police officers' testimony by explaining that the officers had returned to the scene 10 minutes later to investigate further because of the evasive and improbable statements concerning disposal of the bag.

[7] Clark's objection to the admission of the analysis of the contents of these bags is discussed below.

Furthermore, defendant's conversation with the officers and the bag of narcotics which they subsequently found were not the products of a custodial interrogation. In seeking to safeguard Fifth and Sixth Amendment rights, the Supreme Court in *Miranda* was nevertheless careful to preserve to the police their role in traditional "on-the-street" inquiries:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime in the fact-finding process is not affected by our holding." 384 U. S. at 477.

An exact definition for "custodial interrogation" is, by its nature, an impossibility. The problem must, of necessity, be approached on a case-by-case basis. See *United States v. Gibson*, 392 F. 2d 373 (4th Cir. 1968). There was, in the instant case, "no evidence of the application of force or intimidation, physical or psychological, actual or implied," *Government of Virgin Islands v. Berne*, 412 F. 2d 1055 (3rd Cir.), cert. den. 396 U. S. 837 (1969), and the inquiry was essentially a routine one, *Allen v. United States*, 390 F. 2d 476, modification refused, 404 F. 2d 1335 (D. C. Cir. 1968), with the questioning being conducted during "an inquiry concerning a minor violation" which was "the product of curiosity or even suspicion, but [was] neither addressed to a person in custody or under restraint." *James v. United States*, 418 F. 2d 1150 (D. C. Cir. 1969). Clark was never placed under arrest, even though he may have been "detained". In light of all these factors, we hold that the testimony of Clark's statements was admissible.

Clark's constitutional objection to the admission into evidence of the narcotics found by Officer Seifer is equally without merit for it is clear that it was seeing a man with a bag in a particular area of the city and then, thirty or

forty seconds later, seeing the same individual without a bag which led to the search of the vacant property and not the questioning of Clark.

"Chain of Custody" of Incriminating Evidence

Clark argues that the Government failed to present evidence sufficiently connecting the testimony of the analysis of heroin in, and the identification of his fingerprints on, the packages delivered to the chemist with the contents of the paper bag recovered by the officers from the vacant lot to permit the introduction of this testimony into evidence.

The testimony at the trial reveals that the officers, upon finding the discarded bag, immediately took the two juice cartons they found in the bag to their precinct house where they turned them over to to a Sergeant Persetic. They counted the contents and found that one carton contained 171 glassine envelopes while the other contained 176. Both sets were placed in the drawer of the desk at the precinct house. The following morning an Officer Diggs picked up a package at the precinct from an unidentified officer and delivered it to a Mr. Jerpe at the city Crime Lab. Jerpe examined the contents of the bag and tagged it. The next day he turned it over to a chemist who verified that one carton contained 171, and the other 176, glassine envelopes. He emptied 14 of these envelopes selected at random and found that they contained heroin. Several days later over 300 envelopes from the tagged bag were emptied, sent to, and received by the Federal Bureau of Investigation, where eleven latent fingerprints were discovered on the envelopes. Four of these prints belong to the defendant.

Clark argues that since the Crime Lab received the bag from an unknown person at the precinct on the morning

following its discovery; there is a "break" in the chain of custody necessary to permit introduction of the analysis. Furthermore, he asserts that since there is testimony that 340 empty envelopes were sent by the Crime Lab to the F. B. I., while the F. B. I. testified to receiving only 308 such envelopes from the Pittsburgh facility, there is an inconsistency in the testimony necessitating the exclusion of the fingerprint identification.

Initially, it is noted that the trial judge in the instant case gave a charge[8] on the subject of "chain of custody" after being requested to do so by defense counsel. He concluded by instructing that:

> ". . . if you are not convinced beyond a reasonable doubt that those bags on which the defendant's fingerprints were found are the bags that were found

---

[8] "I suppose I should have charged you, if I did not, that if the glassine bags in Exhibit 14—that brown bag there that got down to Washington; I think it was sent by Inspector McDaniel to Washington with 308 glassine bags in it—if those glassine bags were not the bags found by Officers Seifer and Williams in the tire on March 15, 1967, then you should disregard the fact that the defendant's fingerprints are on them. Those bags in that box must be bags which those officers found that night and not bags that were found some other time or some other place, and the Government has the burden of proving to you beyond a reasonable doubt that those bags in that box were the bags found by Officers Seifer and Williams that night.

"Now, they have tried to retrace their history in to the Number 5 Police Station and from the police station by Officer Diggs to the crime laboratory and from Mr. Jeppe's hand in the crime lab—if I pronounce his name right—in to the chemist's hands the next day when he analyzed the white substance, and by taking 7 packets from one bag and 7 packets from another bag at random, they tried to convince you that the remaining bags—absent 12 and five sent to some other place—were put by Inspector McDaniel into that box and were sent to the Federal Bureau of Investigation in Washington, and it was on those bags that Mr. Jones found the defendant's fingerprints on three of them. On three of those bags, he found four of the defendant's fingerprints, as I recall the testimony.

"Now, if you are not convinced beyond a reasonable doubt that those bags on which the defendant's fingerprints were found are the bags that were found by those policemen, Seifer and Williams, out there on Railroad Street or near Railroad Street on the night of March 15, 1967, then this defendant should be acquitted.

"Are there any other exceptions?

"Mr. Brown: No, your Honor.

"Mr. Zurawsky: No, your Honor."

by these policemen, Seifer and Williams, out there on Railroad Street or near Railroad Street on the night of March 15, 1967, then this defendant should be acquitted.'"[9]

A trial judge's determination that the showing as to identification and nature of contents is sufficient to warrant reception in evidence of the results of a test on the article may not be overturned except for a clear abuse of discretion. We find no such abuse of discretion here. See *Gallego v. United States*, 276 F. 2d 914 (9th Cir. 1960). While it is true that an object connected with a crime must be shown to be in substantially the same condition as when the crime was committed before it can be admitted, *United States v. S. B. Penick & Co.*, 136 F. 2d 413 (2nd Cir. 1943), the objections which the defendant here makes go to the weight of the evidence rather than to its admissibility and, hence, the question was properly left to the jury. *Williams v. United States*, 381 F. 2d 20, 21 (9th Cir. 1967); *United States v. S. B. Penick & Co.*, *supra*, at 415.

For the reasons stated above, the judgment will be affirmed.

A True Copy:

Teste:

.....,

Clerk of the United States Court of Appeals for the Third Circuit.

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[9] Whether 340 or 308 envelopes were sent to, and received by the F. B. I. is immaterial, since all the testimony is that the envelopes sent to the F. B. I. came from the tagged bag, so that the eleven fingerprints were on envelopes taken from such bag. The charge made clear that the jury had the function of determining the facts.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,841

UNITED STATES OF AMERICA,
vs.
CALVIN CLARK,
Appellant.

(D. C. Criminal No. 67-111)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: Hastie, Chief Judge and Van Dusen and Adams, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record for the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed January 17, 1969, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

April 30, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1621

CALVIN CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts charging violations of the narcotics laws with respect to heroin (21 U.S.C. 174; 26 U.S.C. 4704(a)). He was sentenced to concurrent prison terms of ten years and to pay a fine totalling $5000. The court of appeals affirmed (Pet. App. B).

Petitioner contends that evidence of more than three hundred glassine bags containing heroin, some of which bore his fingerprints, should have been suppressed as the fruit of unlawful custodial interrogation absent warnings under *Miranda* v. *Arizona*, 384 U.S. 436. He also maintains that the proof at trial as to the chain of custody of the seized narcotics was insufficient to support his conviction. These contentions, which on the facts of record may properly be characterized as frivolous, are fully answered in the opinion of the court below, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE 1970 380374 602